Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-496

TED R. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

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NOW COMES Ted R. Moore, Petitioner, and petitions the Court to issue its Writ of Certiorari to the Appellate Court of Illinois, Second District.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Second District in this case, *People* v. *Moore,* is reported at 65 Ill. App. 3rd 712 and at 382 N. E. 2d 810. The opinion of the same Court in a companion case decided the same day, *People* v. *Friedman,* is reported at 65 Ill. App. 3rd 613 and 382 N. E. 2d 684. For the convenience of the Court, both of those opinions are reproduced in the Appendix. In denying the Petition for Leave to Appeal the Supreme Court of Illinois filed no opinion, nor was there an opinion by the trial Court.

JURISDICTIONAL STATEMENT.

The opinion of the Appellate Court of Illinois was filed November 2, 1978. Timely Petition for Leave to Appeal was filed in the Supreme Court of Illinois. That Petition was initially denied on March 29, 1979. Subsequently, Petitioner moved the Supreme Court of Illinois for reconsideration in view of this Court's impending decision in *Parker* v. *Randolph*, ... U. S. ..... 60 L. Ed. 2d 713, 99 S. Ct. 2132 (No. 78-99). That motion was taken under advisement by the Supreme Court of Illinois and, upon that Court's consideration of this Court's opinion in *Parker* v. *Randolph*, denied on June 27, 1979. This Court's jurisdiction is conferred by 28 U. S. C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

Petitioner presents that question—whether an interlocking confession exception to the rule of *Bruton* v. *United States*, 391 U. S. 123, exists—upon which the Court was evenly divided last term. In addition, Petitioner contends that even if an interlocking confession exception does exist, its use in this case is misplaced because there was no confession of Petitioner. Finally, but also involving the Sixth Amendment's Confrontation Clause, Petitioner contests the constitutionality of his inability to cross-examine the confessing co-defendant.

CONSTITUTIONAL PROVISIONS INVOLVED.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U. S. Const., 6th Amend.

STATEMENT.

Defendant Ted Moore was indicted with a number of other individuals in a thirteen-count indictment charging conspiracy as well as substantive violations of the Illinois theft by deception statute, Ch. 38, Ill. Rev. Stat. § 16-1(b)1. Pretrial motions for severance were advanced by Defendant's trial counsel, A.7.[1], and were thereafter denied although parallel motions on behalf of some co-defendants were granted. Accordingly, Petitioner Moore proceeded to trial jointly with the Defendant Friedman, the central defendant and the chief operating officer of the business organization the indictment described as fraudulent.

Moore's motion for severance anticipated several real and serious problems that would arise in the course of the trial. He alluded in his pretrial motion to problems related to his inability to cross-examine his co-defendant Friedman[2] and as well to the fact that his and Friedman's defenses were likely to be antagonistic. After the motion was denied, Petitioner and Morris Friedman went to trial before a jury in the Circuit Court for Lake County, Illinois.

Basically, the evidence indicated that individuals seeking to own and operate their own businesses became interested in the Defendant Friedman's organizations through advertisements placed in local newspapers. Moore was a salesman for the four corporations, viz., Candy Merchandising Council of America, Plantation Candyland, Diversified Marketing and Diversified Electronics. Subsequently he contacted those individuals and

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1. To refer to the Abstract of Record filed in the Appellate Court we have used the notation "A". The complete trial record was filed in that Court in No. 77-343, *People* v. *Morris Friedman*, and incorporated in the case at bar only by reference. The Appellate Court opinions in both cases are reproduced in the Appendix, for reference to which we have used the notation "App." By letter dated August 17, 1979, we have requested the Clerk of the Supreme Court of Illinois to prepare and forward the record directly to the Clerk of this Court.

2. A. 8.

sold them candy and tape cassette distributorships. Taken in the light most favorable to the prosecution the evidence tended to show certain of the representations Moore made, regarding what the company would do to insure the success of the business enterprises upon which the customers were about to embark, were not precisely true.

As part of the sales presentation, Moore explained to prospective distributors that the company would send a locator who would sign up retail accounts for the candy and/or stereo tapes to be handled by the distributor. According to the distributors, the accounts were represented by Moore as high traffic locations capable of a volume of retail sales, whereas in fact, the locators eventually sent by the company placed the distributor's display racks and merchandise in less desirable places, e.g., local florist's shops, etc. Also as a part of his sales presentation, Moore utilized a profit projection indicating that a distributor could realize a very substantial profit on the sale of the merchandise. The distributors testified that Moore urged caution in the use of the profit projection frequently stating that a distributor could make only half as much money as the projection indicated. That half, however, still presented a very attractive financial picture. It also appeared that the kinds of candy eventually furnished to the distributor by the companies differed from those displayed by Moore in his sales presentations. There was also evidence that in the course of some of his sales calls, Moore represented himself as a vice-president of the company, although he never held any actual office in any of the corporations. A. 16 et seq.

Significantly, the evidence indicated a division of function within the corporations so that Moore's work was restricted to the selling of distributorships, while Friedman and others responsible to him directly had the responsibility of acquiring locations and also of acquiring and shipping the candy and the stereo tapes to the distributors. The distributors were to realize their anticipated profit solely from servicing the retail accounts. Ultimately, the company ceased operation and most of the distributors, as a consequence, suffered various degrees of financial loss because their profits simply were insufficient to return their initial investment in the distributorship.

From the above factual analysis, the direction of the contentions of the two defendants readily emerges. Moore's defense simply held that he worked for the company as a salesman, that he made the sales presentation provided by the company in good faith, that he was not responsible for the company's failures to make good upon his promises. Friedman on the other hand defended on the ground that he was responsible only for operating the corporations and not for the excessive zeal of the salesmen.

In the course of the trial, several incidents occurred without some explanation of which our contentions on behalf of Moore cannot really be appreciated. The first witness for the State, an investigator for the Attorney General's office, named Stan Kaiser, after reviewing the financial books and records of the companies, testified concerning the post-conspiracy admissions of the Defendant Friedman spoken in the course of investigative interviews by him. A. 15. Friedman indicated that "they" made $2,500,000.00 and paid off a number of people. The timely objections of counsel for Moore to this conversation as well as those which followed were overruled and his motions for mistrial denied. The jury was instructed:

> "Any admission or conversation between the witness and Defendant Friedman, of course, would not apply to Mr. Moore." A. 15.

Kaiser also testified that Friedman told him that he desired to make a deal so that he could go to a federal rather than a state penitentiary and that Friedman again stated that "they" made approximately $2,500,000.00 this time adding that Moore made about $120,000.00.

Clinton Miller, a distributor who purchased his distributorship from Moore, testified that because he was dissatisfied with the progress of his business, he went to Lake Zurich, the home

office of the corporations and talked with Friedman in Moore's absence. Friedman, according to Miller, A. 28, stated that he was required to go to Washington to testify before a Senate subcommittee and offered Miller $1,000.00 to be a character witness for him. The objection of trial counsel for Moore to that conversation was sustained, but further evidence from Miller was admitted. In response to Miller's demand that the company repurchase his distributorship, Friedman laid a revolver on the table stating unequivocally that there would be "no buyback". A. 28.

A woman named Sister Reed, whose distributorship was purchased from a salesman other than Moore, was permitted to testify—again with a limiting instruction—to a telephone conversation she had with Friedman in an attempt to obtain a refund of her money. In the course of this conversation, she confronted Friedman directly with the question whether he had previously been convicted of a criminal offense. Friedman responded affirmatively, admitting that he had been so convicted, that the prior offense was fraud, and that he had entered a plea of *nolo contendere*. Gratuitously, Friedman added that he was the front man for an organization known as the Mafia and that through his connection with the Mafia, he had learned how to make money. A. 35.

Lawrence Gold, a co-defendant whose case had been severed from those of Friedman and Moore, testified to a number of conversations occurring between Friedman and himself in the absence of Moore. Those questions established the critical elements of the knowledge of both Friedman and Gold that the distributors were complaining and unhappy and that the profit projection as well as other portions of the sales presentation being utilized by the salesmen were simply not realistic. A. 36 et seq. In the course of one conversation, Friedman discussed his need to obstensibly leave the company "because of this court thing" and his desire to run the businesses through a "front". A. 37. Gold also stated that on one occasion upon which he

was in Friedman's company in the absence of Moore, Friedman engaged in rifle practice. A. 38.

All of the above evidence was admitted as a part of the State's case against Friedman, but not against Moore, in a joint trial. Neither Friedman nor Moore testified at the trial.

On that evidence, both defendants were found guilty by the jury. Post-trial motions were denied and sentences imposed. Moore was sentenced to serve not less than 3⅓, nor more than 10 years, in the state penitentiary. Consecutive sentences of 3⅓ to 10 years imprisonment were imposed upon Friedman. A. 70; App. 4.

Each defendant appealed separately to the Appellate Court of Illinois, Second District. In opinions announced the same day, the conviction of Defendant Friedman was reversed and the cause remanded to the Circuit Court for a new trial based upon the denial of his right to be represented by the attorney of his choice. App. 14 et seq. Moore's conviction and the sentence imposed upon him were affirmed. App. 1 et seq. From that affirmance, we sought leave to appeal to the Supreme Court of Illinois. That Court denied our petition, but on learning that this Court had heard *Parker* v. *Randolph*, ... U. S. ..... on the merits and was about to deliver an opinion, the Illinois Supreme Court held our motion for reconsideration *sub judica* until June 27, 1979, when it was denied. After that denial, we now seek this Court's writ of certiorari to review the last determination on the merits, that of the Appellate Court of Illinois.

REASONS FOR GRANTING THE WRIT.

1. The Threshold Question in This Case Is Identical to the One Upon Which This Court Evenly Divided in Parker v. Randolph Last Term. It Should Be Resolved.

Last term in *Parker* v. *Randolph*, ... U. S. ....., 60 L. Ed. 2d 713, 99 S. Ct. 2132 (No. 78-99), this Court evenly divided

upon the question whether there was an exception to the rule of *Bruton* v. *United States*, 391 U. S. 123, in cases involving an interlocking confession by the complaining defendant. A majority in *Parker* reversed the Court of Appeals for the Sixth Circuit and thereby reaffirmed the convictions of several defendants. Mr. Justice Rehnquist's opinion, in which the Chief Justice, Mr. Justice Stewart, and Mr. Justice White joined, reached that resolution by establishing an interlocking confession exception. Mr. Justice Blackmun, concurring, agreed with the result reached in the plurality opinion but squarely denied the existence of a special rule for interlocking confession cases. He predicated his judgment on the harmless error doctrine of *Chapman* v. *California* 386 U. S. 18, *Harrington* v. *California*, 395 U. S. 250, and *Schneble* v. *Florida*, 405 U. S. 27, concluding that the *Bruton* error in *Parker* v. *Randolph* was harmless beyond a reasonable doubt. Mr. Justice Stevens authored a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined. He also denied the viability of an interlocking confession exception, applying the harmless error doctrine instead; but he concluded that the error was not harmless. Mr. Justice Powell did not sit in *Parker* v. *Randolph*.

This case, we think, provides an appropriate vehicle for the resolution of the question which evenly divided the Court. We perceive that the application of the harmless error doctrine to the case at bar would be difficult indeed, due to the explicit reliance of the opinion of the Appellate Court of Illinois upon the interlocking confession exception and the language of its opinion concerning the harmlessness of the error: *e.g.*;

> "In the instant case, the defendant objects to admitted testimony by certain witnesses who testified that the co-defendant was a front man for the organization of "Mafia"; that the co-defendant "had * * * other people fronting for him" who "were netting 64 percent, which is somewhere around $96,000"; that the co-defendant was quoted at trial as having told one witness "that they made about two and a half million dollars and also stated that Moore made about

> 120—". Additionally, the co-defendant's response to an investor's request for a return of his investment was described in the following manner:
>
> > "Well, at that time he opened his desk drawer, he pulled a revolver out, and laid it on the table, and he just sat there, and he fingered that revolver, and he said, 'There will be no buy-back,' and that's the way he said it."
>
> Initially we note that none of the above statements were particularly favorable to the defendant's case." App. 7.

Accordingly, the "narrow" area of disagreement between the dissent in *Parker* v. *Randolph* and the concurring opinion is not presented on this record. The fundamental question is presented in sharp relief. We respectfully submit that this Court ought to resolve that question in this case.

2. Even if an Interlocking Confession Exception Exists, Reliance Upon It in This Case Is Misplaced.

In his concurring opinion in *Parker* v. *Randolph*, Mr. Justice Blackmun stated:

> "Unfortunately, it is not clear that the new approach mandates even an inquiry whether the confessions interlock. . . It [the plurality opinion] thus comes close to saying that so long as all the defendants have made some type of confession which is placed in evidence, *Bruton* is inapplicable without inquiry into whether the confessions actually interlock and the extent thereof."

An examination of the opinion of the Appellate Court of Illinois will reveal that this is a case in which the interlocking confession exception was invoked when in fact petitioner made no confession whatever. The statements upon which that opinion relies were made by Moore in the course of his selling activities. They were in the nature of representations to prospective purchasers. Nowhere does this record reflect any admission of guilt by Moore. There was no post-arrest statement such as the

co-defendant Friedman made. There was no loose jailhouse talk such as was involved in *Dutton* v. *Evans,* 400 U. S. 74. There simply is nothing to trigger any interlocking confession exception.

Further, the statements which Moore did make in the course of his selling activities he does not deny and he never has. His defense was not that those statements were not made, but that they were made in the course of normal rather than fraudulent selling activity. The issue to be determined at the trial as to Moore was simply the presence or absence of a specific intent to defraud on his part. Decision of that question requires some inquiry into Moore's knowledge of Friedman's aspect of the enterprises involved. There is no admission by Moore anywhere in which he admitted specific intent to defraud or any knowledge of the deficiencies in Friedman's operations.

In such circumstances it cannot be said in this case, as in the plurality opinion in *Parker* v. *Randolph,* that the effect of the co-defendant's post-arrest, uncross-examined remarks was not devastating. It may well be true that the "devastating consequences" envisioned in *Bruton* are not nearly so real when a defendant has admitted his own guilt. But, if that is the reason for the interlocking confession exception, how can it be applied to a defendant who has not admitted his own guilt?

In *Dutton* v. *Evans,* 400 U. S. 74, a two part test was applied under the Confrontation Clause taking into account the significance of the uncross-examined statements and their fundamental reliability. Our case for petitioner passes that test. The evidence of Friedman's statements constitute almost the entire case against Moore on specific intent to defraud, the only contested issue. The context of Friedman's statements negated their reliability. His remarks were made in three basic situations. Some were spoken to complaining purchasers where Friedman's objective was obviously to lull his victim and diffuse suspicion. Some of the statements were simply braggadocio, Friedman's attempts to present himself as something he was not in order to

inspire fear in his listener. The third context in which Friedman made remarks admitted into evidence was his post-arrest conspiracy statement to the investigator which surely has nothing to commend its reliability.

The offending statements in this case then were important, indeed critical, to the resolution of Ted Moore's case. They were unreliable and their effect was devastating. All this, in a situation in which there was no statement of Petitioner that can rightly be categorized as a confession or even an admission of guilt. In such a case we respectfully submit that the invocation of the interlocking confession exception to avoid the impact of *Bruton* is constitutionally unacceptable.

3. This Court Ought to Clarify the Relationship Between Bruton Issues and the Right to Cross-Examination.

The importance of the right to cross-examination this Court has emphasized in such cases as *Davis* v. *Alaska,* 415 U. S. 308, is particularly relevant in this case. Cross-examination by Moore's attorney of the co-defendant Friedman on the basis of his statements could not have helped but been successful in demolishing the impact of those statements upon Moore's case. The issue here again was specific intent to defraud. While Friedman's statements plainly implicated Moore they did not describe any specific action by Moore which, if true, would constitute circumstantial evidence of specific intent to defraud. There is little to indicate that Friedman could possibly have had any knowledge of Moore's intent because of the division of function in the companies, yet his statements concerning the money "they" made and his own fraudulent intent clearly resulted in Moore's conviction. Any competent lawyer would have pointed out to the jury on cross-examination the real failure of Friedman's statements to implicate Moore in a meaningful way.[3] We

3. Any competent lawyer might well have pointed out that failure in argument as well as in cross-examination, but the effect of the *Delli Paoli* instructions (*Delli Paoli* v. *United States,* 352 U. S. 232) is to render even argument on the subject improper.

should not permit a conviction to stand when such an important and sensitive constitutional right has been swept away, particularly in a case in which its exercise would have been Petitioner's only salvation.

CONCLUSION.

For the reasons expressed above we respectfully ask this Court to issue its Writ of Certiorari to the Appellate Court of Illinois, Second District.

Respectfully submitted,

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September, 1979

APPENDIX.

No. 77-327

IN THE APPELLATE COURT OF ILLINOIS

Second District

The People of the State of Illinois, *Plaintiff-Appellee,* *vs.* Ted Moore, *Defendant-Appellant.*	Appeal from the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois.

MR. JUSTICE BOYLE delivered the opinion of the court:

Following a joint jury trial in Lake County with co-defendant, Morris Friedman (whose appeal is also disposed of this date in an opinion filed in this court in Case No. 77-343), the defendant, Ted Moore, was found guilty of 1 count of conspiracy and 10 counts of theft by deception in excess of $150. The defendant was sentenced to concurrent 3⅓-to-10-year terms for each of the above offenses.

On appeal the defendant raises the following issues: (1) Whether the defendant was proved guilty beyond a reasonable doubt; (2) Whether the admission into evidence of certain statements attributable to co-defendant, Friedman, violated the *Bruton* rule; (3) Whether the trial court's refusal to grant a severance was an abuse of discretion; (4) Whether the trial court erroneously refused to grant defendant's motion for mistrial; (5) Whether the trial court's determination that a conviction of the defendant was admissible was an abuse of discretion; and (6) Whether the defendant's sentence was excessive.

Prior to reaching these issues we must first consider defendant's contention in his supplemental brief. In this brief, filed subsequent to the First District's opinion in *People* v. *Massarella* (1977), 53 Ill. App. 3d 774, 10 Ill. Dec. 912, 368 N. E. 2d 507, the defendant contends his indictment should be dismissed or alternatively the case should be reversed and remanded for a new trial because his indictment and conviction were obtained pursuant to the activity of the Attorney General who defendant avers had exceeded his statutory and common law authority in presenting the case to the grand jury and prosecuting the case at trial. In *People* v. *Massarella,* 53 Ill. App. 3d 774, the First District of this court held that where the Attorney General, through his assistants, presents a matter to the grand jury and prosecutes a case at trial unaccompanied by the State's Attorney and where all the State's Attorney's actions are at most ministerial, the Attorney General's actions are improper and beyond his authority and require the dismissal of the defendant's indictment. However, while this appeal was pending, the supreme court reversed the First District and clarified this question of the statutory and common law powers of the Attorney General in *People* v. *Massarella* (Docket No. 50113, Oct. Term 1978), ... Ill. 2d ....., ... Ill. Dec. ....., ... N. E. 2d ....., wherein the court stated that:

> "the Attorney General may assist the State's Attorney to the extent that he may discharge all those powers of the State's Attorney at all stages in a prosecution, including the preliminary proceedings such as presentations to a grand jury, where the latter does not object." ..... Ill. 2d at .....

It would unduly prolong this opinion to reiterate the entire rationale posited by the supreme court in *People* v. *Massarella,* ..... Ill. 2d ....., relevant to the statutory interpretation of the Attorney General's authority. It is sufficient to note that we believe that under *People* v. *Massarella,* ..... Ill. 2d ....., the State's Attorney's statements in the instant case that "the Attorney General is *cooperating* with the State's Attorney of

Lake County for the purpose of seeking an indictment against the seven named individuals * * * " (emphasis added), as well as his acknowledgement that "the questions will be asked by the Assistant Attorney General who will *cooperate* with me in this case for prosecution in Lake County, Illinois" (emphasis added), clearly indicate that the State's Attorney did not object to the Attorney General's assistance in the discharge of the State's Attorney's own powers both before the grand jury and at trial. Accordingly, we must conclude that the Attorney General was at all times within the scope of his statutory duties because the record does not show an objection by the State's Attorney to the Attorney General's participation either before the grand jury or at trial, nor, in fact, any effort by the State's Attorney to exclude him from these proceedings.

The present case involves the sale of distributorships to purchasers, hereinafter referred to as investors, by the defendant, who represented himself to be both a salesman and a vice-president of various companies—the primary ones being the Candy Merchandising Council of America (hereinafter CMCA), Plantation Candyland, Diversified Marketing and Diversified Electronics. These companies were located in Lake Zurich, Illinois, and were in operation during the years 1973 through 1975.

At trial, 11 witnesses testified that each had responded to an advertisement in the newspaper and were subsequently called upon personally by the defendant. At this time the defendant would inform the investors that for $6,500 to $13,000 they could purchase a distributorship for candy or tape cassettes from one of the aforementioned companies. The investors then signed written contracts which promised that the marketing department of the various companies would obtain retail display locations for the placement of the candy or the tapes. The numbert of locations or accounts varied between 10-30, depending on the initial investment. Thereafter, the investors, within a couple weeks, would receive approximately $1,500-worth of

candy or $700-worth of tapes, depending on the particular distributorship plan for which they had contracted. According to the defendant, the rest of their investment would be credited to their initial investment at the rate of 10 percent of each additional order. The defendant's other written or oral representations consisted of the following: (1) That the accounts or locations would be of the high-volume, high traffic accounts such as Walgreens, Jewel or A & P; (2) That the investors would make $1,000 per year on each account or location; (3) That the companies would furnish specialists who would set up the accounts at the high-volume stores; (4) That, upon request, a refund of their investment would be forthcoming to the investor, subject to adjustment for bills outstanding; and (5) That the references given by the defendant to the investors were other successful business people involved in this line of sales with these companies.

According to the investors at trial, what really happened is that sometimes no one came in to assist in securing these accounts or the actual assistance was, at best, minimal, and the accounts that were obtained were of the low-volume variety such as five tables at the local florist—which was considered five accounts by the companies. All the investors testified that their distributorships lost money and only a few of them even sold their initial shipment of candy or tapes. Further, none of the investors' attempts at obtaining a refund of their money was successful. Similarly, the investors' efforts to locate the defendant and inform him of their difficulties all met with no success. Additionally, there was testimony that at least one phone reference given to the investors by the defendant in the name of Michael Stevens, who was supposedly a prosperous distributor, was, in fact, the telephone number of the defendant himself. Finally, there was testimony from an investigator of the Attorney General's office who analyzed the numerous companies and stated that $1,737,000 went through the companies' accounts and $99,000 was disbursed to the defendant.

Following the presentation of the State's case in chief, the trial court granted the State's motion to dismiss eight counts against the defendant and co-defendant. The defendant's remaining 10 counts of theft by deception and 1 count of conspiracy went to the jury, and the jury found the defendant guilty on all counts.

The defendant contends first on appeal that the evidence failed to prove his guilt beyond a reasonable doubt. The defense argues that the State failed to show that the defendant had the requisite knowledge of what was actually taking place in this business to sustain his conviction for theft by deception.

The requisite knowledge necessary to establish the defendant's intent to commit theft by deception is set forth by Ill. Rev. Stat. 1975, ch. 38, par. 15-4(e), which states that:

> " 'deception' means knowingly to:
>
> (e) Promise performance which the offender does not intend to perform or knows will not be performed. Failed to perform standing alone is not evidence that the offender did not intend to perform."

The evidentiary requirement of this particular statute was recently restated by this court in *People* v. *Ballard* (Docket No. 76-565, Oct. 20, 1978), ... Ill. App. 3d ....., ... Ill. Dec. ....., ... N. E. 2d ....., wherein the court stated that:

> "Specific intent to defraud need not be proved by direct evidence but may be proved by the surrounding facts and circumstances; further the factual issues are for the jury to determine and the jury's finding will not be disturbed unless the proof does not meet the requirements of the law. (*People* v. *Warren* (1971), 2 Ill. App. 3d 983, 276 N. E. 2d 92.)" ..... Ill. App. 3d at .....

In *Ballard,* this court in upholding the defendants' convictions for theft by deception found that the testimony of the 12 complaining witnesses was sufficient to show that the defendants did not even attempt to honor their promises to investors concern-

ing the quality of the merchandise and locations which were to be furnished and that "the failure of the defendants' enterprise came not from over enthusiasm or business 'naivete', but that the promises made were never intended to be fulfilled." ..... Ill. App. 3d at .....

In the present case, the evidence as previously set forth conclusively establishes that the defendant's acts and intent throughout were to deceive members of the public into investing in a distributorship business which was largely a sham. The defendant induced these individuals to invest in a candy or tape distributorship which the defendant knew or must have known was completely devoid of value. The defendant represented to these victims: that the types of sales locations they would have were of the high-volume variety such as supermarkets or drugstores when, in fact, the locations would be at the local florist or worse; that the investment had a money-back guarantee when, in fact, all the victims testified they never received their money back; that other investors and references were making good money on this investment when, in fact, the other investors were being duped and a reference in at least one instance was, in fact, the defendant himself; that marketing assistance for these products would be supplied by the home office when, in fact, minimal, if any, help was forthcoming; and, finally, that the defendant did not make any attempt to honor his promises to the investors either as a salesman or as a vice-president of this company. From all these circumstances it is very easy to infer that the defendant never had any intent to fulfill the various promises and that the failure of these investment came not from poor business management or an increase in the price of candy, but from the obvious intent of the defendant and other members of this company to defraud the public by this scheme. Therefore, we hold that there was sufficient evidence to find the defendant guilty beyond a reasonable doubt.

Defendant contends next on appeal that the introduction of certain of the co-defendant's statements, which implicated the

defendant, violated his right to confrontation under the United States Supreme Court ruling in *Bruton* v. *United States* (1968), 391 U. S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620, because the co-defendant herein was not subject to cross-examination at trial since he did not testify. Defendant further avers that the trial court committed reversible error in admitting these statements and that the prejudice to his case was not alleviated by the court's instructions which limited the admission of these statements to the co-defendant.

The Supreme Court in *Bruton* held that the out-of-court statement by one co-defendant which implicated a second co-defendant was inadmissible in a joint trial because it violated the second co-defendant's right of confrontation under the sixth amendment, where the co-defendant who made the statement was not subject to cross-examination at trial because he did not testify. The Illinois courts have also held, however, that:

> "no violation of the *Bruton* rule occurs when the defendant claiming the benefit of the rule has himself made a similar inculpatory admission which is admitted into evidence. *People* v. *Rosochacki*, 41 Ill. 2d 483, 244 N. E. 2d 136; *People* v. *Bassett*, 56 Ill. 2d 285, 307 N. E. 2d 359; *People* v. *Harper*." *People* v. *Delk* (1976), 36 Ill. App. 3d 1027, 1036-37, 345 N. E. 2d 197, 205.

In the instant case, the defendant objects to admitted testimony by certain witnesses who testified that the co-defendant was a front man for the organization or "Mafia"; that the co-defendant "had * * * other people fronting for him" who "were netting 65 percent, which is somewhere around $96,000"; that the co-defendant was quoted at trial as having told one witness "that they made about two and a half million dollars and also stated that Moore made about 120—". Additionlly, the co-defendant's response to an investor's request for a return of his investment was described in the following manner:

> "Well, at that time he opened his desk drawer, he pulled a revolver out, and laid it on the table, and he just sat

there, and he fingered that revolver, and he said, 'There will be no buy-back,' and that's the way he said it."

Initially, we note that none of the above statements were particularly favorable to the defendant's case. However, we do not believe the above testimony was any more prejudicial or inculpatory to defendant's cause than numerous other statements attributable to the defendant and admitted at trial, which conclusively esablished that the defendant's actions were not those of an everyday salesman or entrepreneur but the actions of an individual out to bilk the life savings of countless, gullible people. Throughout the trial, on many occasions, there was testimony from many witnesses who were deliberately misinformed and inveigled by the defendant concerning this business venture. Typical of defendant's assurances was his statement to one of the witnesses "that Butkus, the football star, would be advertising" for these products. Therefore, in light of the defendant's own damaging, inculpatory admissions in evidence, we find that the defendant's right to confront his co-defendant concerning the aforementioned statements was not violated. However, even if we should find that it was error for the trial court to admit these statements of the co-defendant, the error was harmless beyond a reasonable doubt in light of the overwhelming nature of the evidence against the defendant by which the jury could easily find the defendant guilty without undue reference to the co-defendant's statements, especially where, as here, the trial court instructed the jury to limit the admission of these statements to the co-defendant.

The defendant next argues that the court erroneously denied his motion for severance which was made on several occasions during trial and renewed in his post-trial motion.

It is axiomatic that co-defendants should be tried jointly together unless their defenses are so antagonistic that a severance must be granted to insure the defendants of a fair trial. (*People* v. *Brooks* (1972), 51 Ill. 2d 156, 281 N. E. 2d 326; *People*

v. *Brown* (1975), 27 Ill. App. 3d 569, 327 N. E. 2d 51.) In order for the trial court to grant a severance to defendants because of antagonistic defenses, the defendants must demonstrate more than the mere apprehension that their defenses conflict (*People* v. *Nickson* (1978), 58 Ill. App. 3d 470, 16 Ill. Dec. 29, 374 N. E. 2d 804), but that one or more of the co-defendants will testify, implicating the other (*People* v. *Precup* (1977), 50 Ill. App. 3d 23, 8 Ill. Dec. 621, 365 N. E. 2d 1007). Additionally, the power to grant a severance is discretionary with the trial court and will not be overturned on review unless there has been a clear abuse of discretion. (*People* v. *McNeal* (1977), 56 Ill. App. 3d 132, 13 Ill. Dec. 834, 371 N. E. 2d 926.) In conspiracy cases in particular, the courts have found that as a general rule, individuals jointly indicted should be tried together and a severance should be denied absent a demonstration of the most compelling prejudice. (*United States* v. *Kelly* (5th Cir. 1978), 569 F. 2d 928.) The courts have also stated that where there was an overall scheme implicating the defendants, the severance motion should be denied. *United States* v. *Serlin* (7th Cir. 1976), 538 F. 2d 737.

In the instant case, the defendant was charged and convicted of 1 count of conspiracy and 10 counts of theft by deception in excess of $150—all of which were crimes which were committed by the defendant in an overall plan to deceive various individuals. Neither the defendant nor the co-defendant testified at trial nor, in fact, presented testimony that *directly* implicated the other. In his pre-trial motion for severance, the defendant averred that the co-defendant (Friedman), Joan Jagoditch and Lawrence Gold, as well as the defendant, may testify concerning their knowledge of the company's inability to honor its contracts and promises. The trial court in its discretion severed Jagoditch and Gold from the co-defendant and defendant, but specifically found as to the defendant's motion that:

"* * * I would deny his motion for severance, and state the reason for that is, he is simply named in too many

> counts as one of the conspirators. It is represented he has signed things as vice president. * * * That keeps him in, and I think it keeps him in in a number of counts.
>
> * * *
>
> [T]herefore I feel in as much as he is named in so many counts, the main thing I want to try to say, * * *, is I do not find there is any antagonistic defenses."

We have reviewed the entire record and find that the trial court did not abuse its discretion in denying the defendant's pre-trial motion for severance where his petition as to the co-defendant merely raised an apprehension that either defendant might incriminate the other. We also find that the trial court did not abuse its discretion in denying defendant's numerous other motions for severance. We further find that any prejudice in the admission of some of these statements was at best harmless error in light of the overwhelming testimony which established the defendant's guilt beyond a reasonable doubt.

Defendant next argues that the trial court should have granted his motion for a mistrial because of the testimony of Lawrence Gold, who asserted that various salesmen (and not specifically the defendant) were making promises that they could not possibly deliver on in regard to sales locations and the price of candy. The jury was again instructed to disregard these statements as to the defendant, but the defense nevertheless claims he was irreparably prejudiced by this testimony.

Generally, a trial judge should in his discretion "declare a mistrial if an impartial verdict cannot be reached". (*Illinois* v. *Somerville* (1973), 410 U. S. 458, 464, 35 L. Ed. 2d 425, 431, 93 S. Ct. 1066, ...) In this case, the trial was far from perfect, but it also was not so tainted as to deprive the defendant of a fair and impartial jury trial. The trial court at all times properly instructed the jury to limit the evidence to one defendant or the other, and none of the limited evidence was so prejudicial to the defendant as to warrant a declaration

of a mistrial. Accordingly, the trial court properly denied defendant's motion for a mistrial.

Defendant argues next that the trial court abused its discretion when it determined that the defendant's 1975 conviction in Florida for grand larceny involving sales for the Candy Merchandising Council of America could be used to impeach his testimony if he should testify. Defendant contends that this conviction should not be admissible because it is for the same conduct with which he is charged in the instant case.

The well established rule in regard to the admissibility of prior crimes to attack credibility was set forth in *People* v. *Montgomery* (1971), 47 Ill. 2d 510, 268 N. E. 2d 695, wherein the court held that for the purpose of attacking the credibility of a witness, evidence that he had been convicted of a crime was admissible if the court determined that the probative value of the evidence of the crime substantially outweighed the danger of unfair prejudice. In regard to the admissibility of a prior conviction for the same conduct for which the defendant is on trial, Circuit Judge, now Chief Justice Burger, stated it thusly in *Gordon* v. *United States* (D. C. Cir. 1967), 383 F. 2d 936 at 940:

> "As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.
>
> Of course, there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case. See *Luck, supra* at 157, 348 F. 2d at 769."

In the instant case, in ruling that the defendant's prior conviction would be admissible if the defendant chose to testify, the court noted the following:

> "* * * I feel that the criteria of the Montgomery case is satisfied, * * *, it is a similar offense, and I do not feel that the prejudicial effect would outweigh it's [sic] probative value. In addition to that, under the Illinois law, the defendant could well alleviate most of the problem by simply, in direct testimony, I am not saying he is under a duty to do this, but certainly if he was worried about it, you could ask him if he has ever been convicted of a felony in the State of Florida, or something like that. If he said yes, that would end it, the jury would never know what that was, so the similarity of the situations would go by the board. However, based primarily on the Montgomery case, I will deny the motion."

We believe the trial court's above discourse clearly demonstrates that it carefuly weighed all the facts of this particular situation before determining that defendant's prior conviction would be admissible. Therefore, under the circumstances presented here, we hold that the trial court's denial of defendant's motion to exclude any reference to his prior conviction was not an abuse of discretion, especially where the admission of this prior offense directly related to the defendant's veracity and any similarity between the prior offense and the present charges could have been properly excluded from the jury.

Defendant's final contention is that his sentence of 3⅓ to 10 year is excessive and unwarranted. Defendant argues that such a sentence disregards his rehabilitative potential and his efforts to make restitution in regard to a 1975 Florida conviction as well as posing a severe threat to his health. We disagree.

It is well established that a trial court's exercise of sound judicial discretion in imposing sentence will not be disturbed on appeal absent and abuse of discretion. *People* v. *Perruquet* (1977), 68 Ill. 2d 149, 11 Ill. Dec. 274, 368 N. E. 2d 882.

The trial court herein gave serious consideration to the defendant's health problems at the time of sentencing. These problems of health had not interfered in any way with the

defendant's dubious criminal and business activities. Additionally, the defendant had two prior convictions, one of which was for similar conduct for which he was convicted here. Accordingly, after a review of the nature and extent of these offenses, the defendant's health and rehabilitative potential, we find nothing in the record to indicate that the trial court abused its sound judicial discretion in imposing sentence on the defendant.

The judgment of the circuit court of Lake County is affirmed.

JUDGMENT AFFIRMED.

SEIDENFELD, *P.J.*, and GUILD, J., concur.

No. 77-343

IN THE APPELLATE COURT OF ILLINOIS
Second District

The People of the State of Illinois, *Plaintiff-Appellee,* *vs.* Morris Friedman, *Defendant-Appellant.*	Appeal from the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois.

MR. JUSTICE BOYLE delivered the opinion of the court:

A Lake County jury found the defendant-appellant, Morris Friedman, hereafter the defendant, guilty of 10 counts of theft by deception and one count of conspiracy. The trial court imposed concurrent sentences of 3⅓ to 10 years on five of the theft counts, to be served consecutively with concurrent 3⅓-to-10-year sentences on the remaining five counts of theft by deception. The defendant has appealed, essentially raising seven issues. First, the defendant argues that the indictment against him was improperly obtained. Secondly, he asserts that he was not proved guilty beyond a reasonable doubt. His third contention is that he was denied his constitutional right to counsel of his choice. Fourthly, the defendant asserts that the trial court made several errors, mandating a reversal of his conviction. Fifth, the defendant contends that he was improperly convicted of conspiracy. Sixthly, he argues that the jury was supplied with improper verdict forms; and, finally, the defendant argues that his sentence was excessive.

After reviewing the record and weighing the arguments presented, we are of the opinion that this cause must be remanded to the circuit court of Lake County for a new trial on the grounds

that the defendant was denied his constitutional right to counsel of his own choice.

The facts relevant to our disposition of this case begin on May 24, 1976, when the State's Attorney of Lake County, Illinois, appeared before the grand jury seeking the indictment which was the basis for this case. At that time, the State's Attorney of Lake County introduced two Assistant Attorneys General and informed the grand jury " * * * that the Attorney General is cooperating with the State's Attorney of Lake County for the purpose of seeking an indictment * * * " and that " * * * the questions will be asked by the Assistant Attorney General who will cooperate with me in this case for prosecution in Lake County, Illinois." After the Assistant Attorney General had presented the evidence to the grand jury, it returned a 32-count indictment against seven individuals, including the defendant.

The defendant was brought to trial with one other individual, Ted Moore, who is not a party to this appeal. The trial of the two men commenced on January 17, 1977. At the beginning of the proceedings, the defendant informed the court that he was dissatisfied with his court-appointed counsel and requested a continuance so that he might be represented by counsel of his own choice. At that time, the defendant presented the trial court with a letter from Attorney Raymond J. Smith of Chicago in which Mr. Smith stated that he would be engaged in a trial in Federal Court until January 25, 1977, but if the trial court would grant a continuance until after that time, Mr. Smith stated that he would represent the defendant. Although the letter was not in the proper form of a motion, the trial court stated that it would treat it as one and denied it. The defendant was compelled to go to trial represented by the public defender. Two days into trial, the public defender was joined by Attorney General Werkman, who took charge of the defendant's defense for the remainder of the trial.

During the course of the trial the State presented evidence which tended to show that the defendant and Mr. Moore were

part of a scheme to inveigle people to invest large sums of money (at least $6,500) to purchase distributorships from various companies controlled by the defendant which were in the candy business.

The first step in this scheme was the appearance of an ad in a local newspaper advertising the distributorships. The ad was written by the defendant and promised established accounts for a large candy manufacturing company that had proven, chain-store take the prospect's check for at least $6,500 and return to Lake Zurich, Illinois, the location of the home offices of the companies. There, the defendant, or another employee acting under the defendant's instructions, would accompany Mr. Moore to the bank where the check would be deposited in the companies' account and Mr. Moore would be paid his commission. As a finishing touch, each of the new distributors was sent a mail-gram composed by the defendant, congratulating him on becoming a distributor.

The distributors were supposed to recover their entire investment through discounts on the re-ordering of merchandise, and for a while the companies granted discounts on such re-orders. However, the companies went bankrupt long before anyone could even approach recovery of his total investment.

Based upon the above evidence, the jury returned a verdict of guilty on all counts, from which the defendant appeals.

We turn first to the defendant's contention that the indictment was fatally defective because two Assistant Attorneys General presented the evidence to the grand jury and not someone from the staff of the Lake County State's Attorney's office. This precise issue was dealt with in the recent supreme court case of *People* v. *Massarella* (Docket No. 50113, Oct. Term 1978), ... Ill. 2d ....., ... Ill. Dec. ....., ... N. E. 2d ....., There, our supreme court held that the Attorney General has the authority to appear before a grand jury to initiate any action and proceed to prosecute it so long as the local State's Attorney does not object to the Attorney General's appearance.

In the case at hand, the State's Attorney for Lake County did not object to the Attorney General's involvement. In fact, the record makes it clear that the Lake County State's Attorney and the Attorney General were cooperating in the prosecution of this case. Therefore, it is clearly demonstrated that the indictment in this case was properly obtained.

Next, we give our attention to the defendant's argument that he was not proved guilty beyond a reasonable doubt. It shall suffice for us to say that the evidence presented at trial and the circumstances surrounding that evidence more than justify the jury's conclusion that the defendant was an integral part of an atrocious scheme to defraud the unwary by inducing them through promises of marketing experts and high traffic locations to invest in an enterprise controlled by the defendant, which, he knew, was doomed to failure.

Thirdly, we turn our attention to the defendant's contention that he was denied his constitutional right to counsel of his own choice. We agree. The sixth amendment guarantee of the right to counsel includes the right to counsel of one's own choice. (*People* v. *Green* (1969), 42 Ill. 2d 555, 248 N. E. 2d 116; *People* v. *Isenberg* (1978), 60 Ill. App. 3d 325, 17 Ill. Dec. 632, 376 N. E. 2d 778.) However, that right does not permit " 'an indefinite thwarting of the administration of justice.' " (*People* v. *Green* (1969), 42 Ill. 2d 555, ..., 248 N. E. 2d 116, 117.) The State has cited one case, *People* v. *Johnson* (1976), 40 Ill. App. 3d 388, 352 N. E. 2d 462, where the refusal to grant a continuance to obtain private counsel was upheld. In that case, the defendant was represented by the public defender and had previously been granted a continuance to secure private counsel, but failed to do so. The case at hand is clearly distinguishable. First of all, the defendant had not previously been granted a continuance for the purpose of securing private counsel. Secondly, the defendant presented strong evidence that he had already secured the services of an attorney who would represent him if the trial were delayed until the

attorney could finish the case he was then trying. At the very least, the trial court should have investigated the matter to determine how long it would be before the defendant's chosen counsel would be available for trial. (*People* v. *Green* (1969), 42 Ill. 2d 555, 248 N. E. 2d 116.) Instead, the trial court forced the defendant to proceed with the counsel in whom he stated he had lost faith, thereby violating the defendant's constitutional right to counsel of his own choosing and mandating a reversal of the defendant's conviction and a remandment for a new trial.

In light of our decision to remand this cause for a new trial, we need not reach the remaining issues raised by the defendant's brief.

For the above stated reasons, the judgment of the circuit court of Lake County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

SEIDENFELD, *P. J.*, and GUILD, *J.*, concur.

STATE OF ILLINOIS

OFFICE OF CLERK OF THE SUPREME COURT

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Clerk

Telephone
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June 27, 1979

Mr. Robert S. Bailey
Attorney at Law
53 West Jackson Blvd.
Chicago, IL 60604

In re: People State of Illinois, respondent, vs.
Ted Moore, petitioner. No. 51527

Dear Mr. Bailey:

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by petitioner for reconsideration of the order denying petition for leave to appeal is denied.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

CLW:jae

cc: Wm. J. Scott
Dennis P. Ryan